

Benejam



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Priscidon Enterprises, Inc.

File: B-238370

Date: March 30, 1990

Donald Strickland, for the protester.

Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's inadvertent inclusion of small business set-aside notice in solicitation does not require termination of large business awardee's contract where there is no legal requirement that the contract be set aside for small business concerns, and no bidder was prejudiced as a result.

2. General Accounting Office does not consider protest issues which are essentially made on behalf of other potential competitors who themselves may properly protest as interested parties.

DECISION

Priscidon Enterprises, Inc., as agent for Red Carpet Inn, a small business, protests the award of a contract to Ramada Inn North, under invitation for bids (IFB) No. DABT23-90-B-0007, issued by the Department of the Army for meals, transportation, lodging, and a test room for Armed Forces applicants processed through the Military Entrance Processing Station, Columbus, Ohio. Priscidon contends that Ramada, as a large business, was ineligible for award under the small business set-aside clause of the solicitation. Priscidon further challenges the Army's subsequent rejection of Red Carpet's bid on the basis that the agency agreement between Priscidon and Red Carpet constituted an impermissible contingency fee arrangement.

We deny the protest.

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The IFB was issued on December 18, 1989, for a 1-year base period with up to four 1-year options. The Army received eight bids by bid opening on January 17, 1990, three from large businesses and five from businesses certifying themselves as small,^{1/} including Ramada Inn North.

On January 19, the Army awarded a contract to Ramada, the low bidder. On January 22, the contracting officer received a size protest from Priscidon on behalf of Red Carpet Inn, the second-low bidder, challenging Ramada's self-certification as small business under the solicitation. The contracting officer forwarded Priscidon's size challenge to the Small Business Administration (SBA) and, on February 8, the SBA determined that Ramada was "other than a small business."

Priscidon filed its protest with our Office on January 22. Subsequently, on February 21, the contracting officer rejected Priscidon's bid as nonresponsive on the basis of an improper contingent fee arrangement between Priscidon and Red Carpet Inn.

Priscidon argues that the Army improperly awarded the contract to Ramada because, as a large business, Ramada is ineligible for award under Federal Acquisition Regulation (FAR) § 52.219-1, the small business concern representation contained in the IFB, and FAR § 52.219-6, Notice of Total Small Business Set-Aside, incorporated by reference in the IFB.

The Army maintains that FAR §§ 52.219-1 and 52.219-6 were inadvertently included in the solicitation, and argues that the procurement was never intended to be set aside for small businesses and in fact was not required to be set aside. The Army states that the inadvertent inclusion of the set-aside clauses was a harmless error, not prejudicial to the bidders, and that terminating the current contract and resoliciting without the clauses would serve no useful purpose. We agree.

Under the so-called "rule of two," a procurement must be set aside for exclusive small business participation where the contracting officer determines that there is a reasonable expectation of receiving bids from at least two responsible small business concerns and that award will be made at a

^{1/} One small business bidder's price (\$6,487,296) was considered unreasonably high when compared to the other bids, which ranged from \$942,325 to \$1,320,177.

reasonable price. FAR § 19.502-2. The FAR also requires the continued set-aside of a particular acquisition that has previously been the subject of a successful set-aside, where agency regulations so require and the conditions for a set-aside continue to exist. FAR § 19.501(g). Except for these regulatory provisions, nothing in the Small Business Act, 15 U.S.C. §§ 631 et seq. (1988), makes it mandatory that any particular procurement, not subject to small purchase procedures, be set aside for small business concerns.

Here, the Army states that the requirement has been procured on an unrestricted basis for over 10 years, and that it did not reasonably expect to receive competitive bids from two or more responsible small business concerns. Additionally, the record shows that on October 30, 1989, prior to publication of the synopsis of the IFB in the Commerce Business Daily (CBD), an SBA representative advised the contracting officer that "there are no known small or small disadvantaged firms in the local area capable of providing" the required services, and concurred with the contracting officer's determination to proceed with the procurement on an unrestricted basis. As evidence that the procurement was not intended to be set aside, the Army points out that the CBD notice, dated November 21, invited bids from "all responsible sources," indicating an unrestricted procurement. In addition, the solicitation was provided to 33 bidders on the facility's mailing list, without regard to business size, and the solicitation cover sheet was clearly marked "UNRESTRICTED," informing bidders that the procurement was not set-aside for small businesses.

In deciding not to set the procurement aside, the contracting officer concluded that there was no reasonable expectation that bids from at least two responsible small business firms would be received or that award would be made at a reasonable price, given the history of the acquisition and the determination that no small businesses were capable of satisfying the Army's requirements.^{2/} See Gel Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433. Further, the contracting officer's decision to issue the IFB on an unrestricted basis was concurred in by the SBA, a factor to

^{2/} In this regard, the fact that four bidders under the IFB self-certified as small (including Ramada, which ultimately was found to be large) is not relevant to determining the propriety of the initial decision whether or not to set aside. Afghan Carpet Servs., Inc., B-230638, June 24, 1988, 88-1 CPD ¶ 607.

which we give great weight. Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541. Under these circumstances, the contracting officer properly determined that a small business set-aside was not required, and, as a result, there was no prohibition on making award to a large business bidder like Ramada.

Priscidon argues that the Army nevertheless may not properly make award to a large business without resoliciting, since the IFB contained the small business set-aside clause, and large businesses that may have offered bids under an unrestricted solicitation were excluded from the competition. We do not think that Priscidon, as agent for a small business which would presumably benefit from a restricted solicitation, is the appropriate party to raise this issue on behalf of large businesses, a class to which it does not belong. See Maschhoff, Barr & Assocs., B-233322, Nov. 18, 1988, 88-2 CPD ¶ 491.

In any event, we note that both large and small businesses submitted bids in response to the IFB. All bidders competed on an equal basis, with no bidder obtaining an advantage over another because the clauses were included, and there is no indication that any large business was deprived of the opportunity to compete merely because the IFB contained the clauses. In addition, there is no indication that the bidders would have prepared different bids had the clauses been omitted; Red Carpet itself stated that its price would not have changed had the clauses been omitted.

Moreover, bids have been exposed, adequate competition was obtained, seven of the eight bids were considered reasonable, and the deficiency was due to an administrative mistake after the contracting officer properly determined to proceed on an unrestricted basis. Under these circumstances, we find that the inadvertent inclusion of the clauses in the solicitation was a harmless error that does not warrant termination of Ramada's contract and that resolicitation would serve no useful purpose. See Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD ¶ 149.

In view of our conclusion that award to Ramada was proper, we need not consider whether the Army properly found Red Carpet's bid nonresponsive based on its contingent fee arrangement with Priscidon.

The protest is denied.



James F. Hinchman
General Counsel

